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IN THE

# Supreme Court of the United States

**October Term, 1961**

**No. 957**

ROBERT SOBLEN,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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### Interest of *Amicus*

The American Civil Liberties Union, which files this brief with the consent of both parties, is a non-profit, non-partisan organization engaged solely in the defense of the Bill of Rights. The issue with which we are specially concerned in this case is the extent of the responsibility of attorneys for the United States, within the bounds of our adversary system of justice, to bring all relevant evidence to the attention of the trier of facts in a capital case.

We believe that, under the circumstances of this case, the government, by failing to bring forward crucial evidence bearing on the credibility of its principal witness, of which it had knowledge, deprived petitioner of due process of law. In the alternative, if the error was not of constitu-

tional stature, it was, at the very least, so serious that it deserves to be corrected by this Court in its supervisory capacity over the federal courts. Unless certiorari is granted and the question presented here thoroughly briefed and argued, a vital issue relating to the administration of justice in the federal courts will continue unresolved.

## Question Presented

Whether the constitutional demands of due process required the government in submitting the testimony of Jack Soble, its principal witness (and petitioner's brother), to inform the jury that Soble was suffering from a progressive organic brain disease that substantially affected his memory, and that he suffered in addition from a serious psychiatric disorder.

## Statement of Facts[1]

Petitioner, an American citizen, was indicted November 29, 1960, by a federal grand jury in the Southern District of New York. The first count of the indictment charged a conspiracy to obtain information relating to the national defense of the United States. The second count alleged a conspiracy to transmit such information to the Soviet Union. Petitioner was convicted on both counts by a jury and sentenced to terms of ten years and life imprisonment respectively.

One of the two chief witnesses against petitioner was his brother, Jack Soble, who had himself been charged with conspiracy to commit espionage in 1957. Soble pleaded guilty to the charge and was serving his sentence at the

[1] Because this brief is confined to the first question presented in the petition for certiorari, the statement of facts deals only with the facts of the case which are necessary for consideration of that question.

time of his appearance as a government witness against petitioner. He remains imprisoned at the present time.

At the trial the defense knew, or discovered on cross-examination, certain facts relating to Soble's mental condition. Those facts were that Soble attempted suicide in 1958 by swallowing a large quantity of nuts and bolts, that he had been under observation at Bellevue Hospital in 1957, and that he was given twenty electric shock treatments at the Medical Center for Federal Prisoners in 1958 and 1959 (R. 591-98). After trial, the defense learned that Soble had testified in 1958 in a criminal proceeding in the Southern District of New York. *United States* v. *Zborowski*, 271 F. 2d 661 (2d Cir. 1959). Expert testimony of a staff psychiatrist at the Medical Center for Federal Prisoners, where Soble was confined, was adduced at the *Zborowski* trial bearing on his testimonial competence. That testimony revealed that Soble had two illnesses, "one was his severe depression and the other was the impairment which he suffered as a result of his having organic brain disease itself" (NT. 257)[2]; that "at times because of a deficiency in memory and because of the nature of his mental illness, he is capable of filling in gaps in memory with information which he believes to be true but which may not be true" (NT. 258); that "Mr. Soble's mental illness is of the moderate to severe degree, and if I may, if we have the scale to zero to 10 and 10 is the worst, if you will, and zero is the least, I would place him about 7, perhaps, 7½, perhaps 8. In other words, he is well along on this seriously ill side. He is much more seriously ill than he realizes." (NT. 261); and that Soble's illness "reaches * * * into every department of an individual's function, his thinking, his emotions, his judgment, in varying degrees and at different times" (NT. 263).

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[2] "NT." refers to the transcript of the hearing held in the District Court on the motion for a new trial.

This information, which would have critically borne upon the jury's evaluation of Soble's credibility, was necessarily known to the government before petitioner's trial but was not known to the defense until after the completion of the trial (NT. 140-41, 143-44). Nevertheless, on petitioner's motion for a new trial, the trial judge concluded that under the circumstances of this case (App. 29a-33a), the evidence in question could have been discovered by the defense if it had exercised due diligence and that a new trial was therefore not warranted. That judgment was affirmed by the Court of Appeals. *Soblen v. United States*, 301 F. 2d 236 (2d Cir. 1962).

## REASONS FOR GRANTING THE WRIT

### 1. The decision of the Court of Appeals that the Government was not obligated to come forward with information that its principal witness was suffering from a brain disease that substantially impaired his memory, and therefore his credibility, raises an issue of importance to the administration of justice in the federal courts which should be, but has not been, passed upon by this Court.

It is well established that the prosecutor in a criminal case is subject to certain obligations which, if not fulfilled, will lead to the setting aside of a conviction. One group of cases concerns perjured testimony. If the Government knowingly uses such evidence, a conviction obviously cannot stand under the Fourteenth Amendment. *E.g., Alcorta v. Texas*, 355 U. S. 28 (1957). This rule has recently been applied in a case where the defense's impeachment of a prosecution witness was hindered by the perjured testimony. *Napue v. Illinois*, 360 U. S. 264 (1959).

* "App." refers to the Appendix filed with the petition for certiorari.

It is also clear that the Supreme Court, relying on its supervisory power over the federal courts, will not let a conviction stand if perjurious testimony that is not "insignificant" is adduced by the prosecution even if it is not shown that Government lawyers knew of the perjury. *Mesarosh* v. *United States*, 352 U. S. 1, 10-11 (1956).

A second group of cases recognizes that "willful" suppression by the prosecution of evidence "favorable to defendant" constitutes a denial of due process. *Pyle* v. *Kansas*, 317 U. S. 213 (1942) (alternative holding); *United States* v. *Dye*, 221 F. 2d 763 (3d Cir.), cert. denied 350 U. S. 875 (1955); see *Barnes* v. *Leycff*, 202 F. 2d 335, 338 (D. C. Cir. 1952), aff'd *sub nom. Barnes* v. *Wilson*, 346 U. S. 137 (1953); *Woollomes* v. *Heinze*, 198 F. 2d 577, 579 (9th Cir. 1952), cert. denied, 344 U. S. 929 (1953).

Finally, there are cases in which convictions have been overturned by appellate courts employing their supervisory power over federal trials, where the prosecution by no stretch of the imagination could be said to have acted "wilfully". Thus, the Court of Appeals for the Second Circuit recently held that a new trial was required where the Government *negligently* failed to disclose evidence that was "highly relevant" to the impeachment of the chief prosecution witness and of "obvious benefit" to the defense. *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (2d Cir. 1961). See also *Arbuckle* v. *United States*, 146 F. 2d 957 (D. C. Cir. 1944); cf. *Delbridge* v. *United States*, 262 F. 2d 746 (D. C. Cir. 1958); *United States* v. *Heath*, 147 F. Supp. 877 (D. C. D. Hawaii 1957), appeal dismissed, 260 F. 2d 623 (9th Cir. 1958).

The full extent of the obligation of government prosecutors to disclose information of value to the defense is, as the above cases demonstrate, a recurring question in the federal courts on which this Court has never ruled. It should do so in order to provide necessary guidance for the conduct of federal trials.

**2. The decision of the court below was incorrect because it failed to recognize the independent obligation of the prosecution, at least in a capital case, to disclose facts within its possession which severely impaired the credibility of its principal witness.**

As pointed out above, it is well established that willful failure by the Government to disclose to the trier of facts evidence favorable to defendant will result in the setting aside of a conviction. In this case there is no dispute over the facts relating to Soble's mental disease and there can be no doubt that the prosecution's suppression of the expert testimony by the prison psychiatrist was "willful". This is so because the Government, at the time it prepared for trial, must have recognized the bearing of the medical evidence on the jury's acceptance of Soble's testimony.

The facts adduced at the trial in *United States* v. *Zborowski*, supra, make this plain. It is obvious that a jury would want to weigh Soble's words in light of the fact that "he is capable of filling in gaps in memory with information which he believes to be true but which may not be true" (NT. 258); that "He is much more seriously ill than he realizes" (NT. 261); and that this illness "reaches • • • into every department of an individual's function, his thinking, his emotions, his judgment • • • " (NT. 263).

The Court of Appeals in this case recognized the existence of the burden on the prosecution with respect to exculpatory facts within its exclusive control, but ruled that the burden did not exist when the facts are readily available to a "diligent defender" (App. 62a).

This ruling misconceives the nature of the duty on the public prosecutor. The obligation does not depend on the ability or diligence of the particular defense counsel that happen to confront the Government in a given criminal trial. It is an *independent* duty that the prosecution carries

as an intimate part of its function as representative of the state. It is always possible to argue that greater diligence on the part of defense counsel would have unearthed the truth. This argument reduced to its simplest terms, is no more than a means of watering down the prosecutor's obligation.

The principle that lack of diligence by defense counsel in no way qualifies the prosecution's independent duty to produce evidence of critical value to the defendant is being increasingly recognized. Thus, in *Delbridge v. United States, supra*, the court appreciated that counsel for the defendant should have known of the existence of a newspaper article that contained information of great value to the defense. Nevertheless, it reversed the decision of the District Court that denied defendant's motion for a new trial after the article ultimately came to light.

Similarly, in the New York case of *People v. Hoffner*, 208 Misc. 117, 129 N. Y. S. 2d 833 (Queens County Ct. 1952), the court set aside a conviction for murder on the ground that the district attorney had the affirmative duty to produce a stenographic record of what transpired at a police lineup which contained evidence contradicting the testimony of the State's key witness. The court explicitly stated that it was "convinced" that defense counsel "should have known that a stenographer recorded the proceedings of the lineup and that a transcript was in existence at the time of trial."

The independent obligation on the prosecutor to bring forward evidence favorable to the defendant is recognized by the most comprehensive law review discussion of the issue. In Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Colum. L. Rev. 858, 861 (1960), it is stated:

> "* * * that a diligent defense counsel could have discovered the evidence, or that the prosecutor, hon-

> estly doubted the admissibility or reliability of the undisclosed information does not preclude reversal, because the attention of the court is focused solely on the probable accuracy of the judgment and not on the competency or intent of either counsel."

The independent obligation of the prosecution to produce evidence favorable to the defendant, irrespective of the quality of defense counsel, is but another aspect of the rule that basic rights should not be forfeited because of a lawyer's misstep. *E.g., Conley v. Gibson*, 355 U. S. 41, 47-48 (1957).

For these reasons, the Court of Appeals erred in refusing to order a new trial at which Soble's testimony could be properly evaluated by the jury in light of the medical testimony bearing on his credibility.

### 3. The present case is particularly suitable for this Court to determine the minimal duty of disclosure resting on the prosecution.

The court is not being asked to review an ambiguous record or a record raising factual or collateral questions. On the contrary, the issue of the extent of the prosecution's duty to disclose is sharply presented here in a capital case.

In the first place, it is clear that Soble was the principal witness for the Government and that his testimony was instrumental to the case against his brother. Secondly, as the *Zborowski* case shows, there can be no doubt that the full facts relating to Soble's mental condition would have been of major importance to the defense as a basis for impeaching his testimony. Finally, whether the Government's failure to proffer the medical records within its possession be denominated "willful", "reckless", or something else, there is no issue here as to its awareness at the time of trial of the importance to the defense of the information relating to Soble's severe mental illness. The

issue of the prosecution's responsibility is thus focused more clearly than in many of the cases in which a new trial has been ordered. *E.g., United States v. Consolidated Laundries Corp., supra; Arbuckle v. United States, supra.*

## Conclusion

The Court should review the decision of the Court of Appeals because the question of the duty of the prosecution to proffer evidence within its possession that is favorable to defendant is an important one for the administration of justice in the federal courts, has never been clarified by this Court, was wrongfully decided below, and is particularly meet for decision in this case.

**For the reasons stated, the petition for writ of certiorari should be granted.**

Respectfully submitted.

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